Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM KENNETH PEEBLES,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Child Pornography Prevention Act (CPPA) prohibits the possession of any visual depiction that "*appears to be*[ ] of a minor engaging in sexually explicit conduct."[1] It also contains a similar ban concerning any visual portrayal that is "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[2] Do these prohibitions violate the First Amendment to the Constitution?

2. Is the language of the CPPA unconstitutionally vague and overbroad in violation of the Fifth Amendment?

3. Because of his conviction, Peebles is required to register as a sex offender. On appeal, he attempted to argue that the Texas reporting scheme was unconstitutional for a host of reasons. But the Fifth Circuit did not review the matter. It held that Peebles had waived the right to complain. By entering a guilty plea, did Peebles relinquish his right to challenge the Texas Sex Offender Registration Program?

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[1] 18 U.S.C. §§ 2252A, 2256(8)(B) (Supp. IV 1998) (emphasis added).

[2] 18 U.S.C. §§ 2252A, 2256(8)(D) (Supp. IV 1998) (emphasis added).

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioner, William Kenneth Peebles, and the respondent, the United States of America.

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PETITION FOR WRIT OF CERTIORARI

William Kenneth Peebles respectfully petitions for a writ of certiorari to review the judgment from the Fifth Circuit Court of Appeals.

OPINION BELOW

The Fifth Circuit's opinion is not published.[1]

JURISDICTION

The Court of Appeals entered its judgment on October 16, 2000.[2] The mandate was issued on November 12, 2001.[3]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Peebles seeks review from a final federal court decision in a criminal case.

CONSTITUTIONAL AMENDMENTS INVOLVED

The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech, . . . "

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[1] Appendix at 1.

[2] Appendix at 4.

[3] Appendix at 4.

The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

I. Procedural Background

Peebles was charged in a one-count indictment with possession of child pornography.[4] Peebles pleaded guilty, but preserved his right to contest the constitutionality of the Child Pornography Prevention Act.[5]

Punishment was assessed at eighteen months imprisonment and three years of supervised release.[6] As a condition of his supervised release, Peebles is required to register as a sex offender.[7] The conviction was affirmed in an unpublished opinion.[8]

II. Summary of Facts

Since Peebles pleaded guilty to the charge, the facts are not in dispute. But the critical constitutional issues remain intact.

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[4] See 18 U.S.C. §§ 2252A(a)(5)(B) and 2256. *See also* Appendix at page 5 (Indictment).

[5] Record on Appeal, Vol. 3 at pages 16, 20, 21.

[6] Appendix at 21, 22.

[7] Appendix at 25.

[8] Appendix at 1.

Peebles attacked the constitutionality of the Child Pornography Prevention Act (CPPA) of 1996 on First and Fifth Amendment grounds. While his appeal was pending, the Fifth Circuit addressed these concerns in another case and found that the CPPA does not improperly restrict free speech.[9] Peebles disagreed with this holding, and offered a somewhat abbreviated argument to support his position. This was done to ensure that the question was not waived. The Fifth Circuit in fact found that "Peebles raises the issue only to preserve it for possible Supreme Court review."[10] The final answer will therefore come from this Court.[11]

III. The Federal Questions Presented

A. The First and Fifth Amendments

The CPPA prohibits – amongst other things – the possession of any visual depiction that "*appears to be*[ ] of a minor engaging in sexually explicit conduct."[12] It also contains a similar ban concerning any visual portrayal that is "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a

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[9] *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001).

[10] Appendix at 2.

[11] *See Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom., Ashcroft v. Free Speech Coalition*, No. 00-795, 121 S.Ct. 876, 69 USLW 3382 (U.S. Jan. 22, 2001).

[12] 18 U.S.C. §§ 2252A, 2256(8)(B) (Supp. IV 1998) (emphasis added).

minor engaging in sexually explicit conduct."[13] Do these prohibitions constitute an impermissible restriction on free speech in violation of the First Amendment to the Constitution? Is this language unconstitutionally vague and overbroad in violation of the Fifth Amendment?

The Fifth Circuit found that the CPPA does not offend the First Amendment. This conclusion directly conflicts with the Ninth Circuit's determination in *Free Speech Coalition*.[14] It cannot be doubted that this is a question of exceptional importance. The Court recently heard arguments in *Free Speech* and an outcome is pending.

B. Appeal Waiver

Because of his conviction, Peebles is required – upon release from prison – to register as a sex offender. On appeal, he attempted to argue that the Texas reporting scheme was unconstitutional for a host of reasons. But the Fifth Circuit did not review the matter. It held that Peebles had waived the right to complain.

Was the Fifth Circuit correct in its determination? This question turns on whether the contested claims fall outside the scope of what may otherwise be a valid waiver. And in this case, the *contested claims* implicate many constitutional rights: from proportionality to due process, from equal protection to the right to travel. So

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[13] 18 U.S.C. §§ 2252A, 2256(8)(D) (Supp. IV 1998) (emphasis added).

[14] *Free Speech Coalition*, 198 F.3d at 1092.

the somewhat uninteresting topic of *appeal waiver* is elevated to new heights, making it a subject worthy of this Court's consideration.

REASONS FOR GRANTING THE PETITION

I. The First and Fifth Amendments

Peebles' conviction for possession of child pornography was obtained in violation of the First Amendment because the language defining the offense improperly restricts free speech. The CPPA also violates the Fifth Amendment because it is both vague and overbroad. But the Fifth Circuit has concluded otherwise.[15] In so doing, the court aligned itself with the First, Fourth, and Eleventh Circuits.[16] It also expressly recognized – and rejected – the Ninth Circuit's determination that the statute improperly prohibits a type of expression protected by the Supreme Court's extant First Amendment jurisprudence.[17]

The debatable nature of this dispute is underscored by the split in the circuits. The merit of the Fifth Circuit's decision in *Fox* is likewise uncertain. What can be said is that *Fox* went to great lengths in arriving at its conclusion

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[15] *Fox*, 248 F.3d at 403-407.

[16] *See United States v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S.Ct. 115 (1999); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999).

[17] *Free Speech Coalition*, 198 F.3d at 1092.

– a journey that began with the evaluation and reconciliation of conflicting authority, and ended with the forsaking of a well-reasoned opinion that decided the issue quite differently.

This feud will ultimately be resolved when this Court decides *Free Speech Coalition*. In the meantime, Peebles has preserved his attack on the constitutionality of the CPPA. This Court should grant review so as to maintain continuity with *Free Speech Coalition* – whatever its outcome.

II. Appeal Waiver

Flowing from Peebles' conviction is the requirement that he register as a sex offender. His conditions of supervised release specifically compel this constraint.[18] But the Texas statutory program is constitutionally flawed in many respects.[19]

The statutory scheme making up the sexual offender registration laws violates the Eighth Amendment to the United States Constitution in two ways. First, it prescribes collateral consequences analogous to those previously condemned by the Supreme Court. Second, it penalizes conduct in violation of the proportionality doctrine, which is embedded within the cruel and unusual punishment clause of the Eighth Amendment.

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[18] Appendix at 25-26.

[19] *See* generally, TEX. CODE CRIM. PROC. ANN. art. 62.01, *et seq.* (Vernon 2001).

The Texas law also runs afoul of the due process and equal protection guarantees of the Fourteenth Amendment. The seminal reason for this violation is that the statute fails to give meaning to the distinction between non-dangerous offenders, and all the others – a flaw that has prompted at least one circuit court to declare a similar statute unconstitutional.[20]

Finally, the registration law is void for vagueness because it allows for unbridled discretion in its enforcement. There are many conceivable ways to transgress its various mandates – some serious and some not. One is left to wonder how, when, and if it will be enforced.

These issues are all matters of first impression. Yet the Fifth Circuit refused to address them, instead deciding that "Peebles validly waived any appeal of his sentence except for an upward departure from the guidelines."[21] This conclusion is premised upon Peebles' guilty plea.[22] But the plea agreement expressly allowed Peebles to appeal the constitutionality of the CPPA.[23] And with a conviction under the CPPA comes the reporting obligation. So Peebles was in fact entitled to contest any registration scheme. More important, a challenge to the reporting laws does not fall within the scope of any waiver arguably contained within the plea agreement.

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[20] *See Doe v. Dept. of Public Safety*, 271 F.3d 38 (2d Cir. 2001).

[21] Appendix at 2 (citations omitted).

[22] Appendix at 7-18.

[23] Appendix at 11, ¶ 10.

This much is certain given the constitutional nature of the attack.

By refusing to confront Peebles' claims, the Fifth Circuit has decided a question of exceptional importance. When are constitutional challenges foreclosed by entering a guilty plea? The answer advanced by the Fifth Circuit is in direct conflict with decisions from the Fourth Circuit. This Court should grant review and resolve the friction.

ARGUMENTS SUPPORTING REASONS FOR REVIEW

I. The Child Pornography Prevention Act is unconstitutional

In light of *Free Speech Coalition*, Peebles' First Amendment arguments will probably appear a bit redundant. At best, they are well-rehearsed. But some measure should be devoted to the merits of this crucial topic.

A. Portions of the CPPA violate the First Amendment

Until 1996 and the enactment of the CPPA, the common purpose and effect of all child-pornography legislation passed by Congress was to ensure that children were not used or otherwise exploited as the subjects of – or participants in – sexually-explicit materials. But the passage of the CPPA radically transformed the treatment of child pornography. It banned sexually-explicit depictions of actual children, as well as sexually-explicit depictions

of youthful-looking adults and computer-generated images of youthful-looking nonpersons.[24]

There can be no doubt that the CPPA is a content-based regulation of speech.[25] It is therefore presumed unconstitutional,[26] and must be subjected to the most exacting constitutional scrutiny.[27] To survive, the statute must be 1) narrowly tailored 2) to advance a compelling governmental interest.[28] The CPPA's provisions barring sexually-explicit depictions of young-looking adults – and computer-generated images of young-looking non-persons – cannot satisfy either prong of the strict-scrutiny test.

1. The CPPA is not narrowly tailored

The CPPA does not merely impose "time, place, and manner" restrictions on sexually-explicit materials depicting young-looking adults or computer-generated images of nonpersons. It instead criminalizes and completely proscribes this form of speech, without making any effort whatsoever to permit such expression under any circumstances, including those specifically permitted

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[24] 18 U.S.C. § 2256(8)(B), (D).

[25] *See United States v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S.Ct. 115 (1999); *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1249 (1997).

[26] *R.A.V.*, 505 U.S. at 382.

[27] *Boos*, 485 U.S. 312, 321.

[28] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, ___, 120 S.Ct. 1878, 1886 (2000) (citation omitted).

in *Ferber*.[29] The CPPA could not be more broadly drafted. In attempting to restrict the materials to which child molesters and pedophiles have access, the Act outlaws countless other materials that law-abiding citizens have a constitutional right to view.

The CPPA closely resembles other bids by Congress to banish constitutionally-protected material in the name of "saving the children." And all of those endeavors have been held unconstitutional. For example, *Reno v. ACLU*[30] invalidated federal regulations prohibiting "indecent" material on the Internet. In *Sable Communications of California, Inc. v. F.C.C.*, the Court rejected a proscription on *dial-a-porn* messages.[31] Again, in *Bolger v. Youngs Drug Products Corp.*,[32] a ban on mailing unsolicited advertisements for birth control was held unconstitutional. And *Butler v. Michigan*,[33] repudiated a prevention on the sale of books deemed harmful to children.

In each of these cases, the government asserted a compelling interest in protecting children from the harmful effects of sexually-explicit material. But the laws were invalidated as not being sufficiently tailored to serve that pursuit: they "reduce[d] the adult population . . . to reading only what is fit for children . . . thereby arbitrarily curtail[ing] one of those liberties of the individual

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[29] *New York v. Ferber*, 458 U.S. 747, 763 (1982).

[30] *Reno v. ACLU*, 117 S.Ct. 2329, 2346 (1997).

[31] *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 128 (1989).

[32] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983).

[33] *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957).

. . . that history has attested as the indispensable conditions for the maintenance and progress of a free society."[34] In short, the CPPA has the effect of limiting the content of adult material to that which is suitable for only children or pedophiles. It is not narrowly tailored.

2. There is no compelling interest

If it is assumed – for the moment – that the CPPA is properly tailored, the Act does not meet the second prong of the strict scrutiny test. The challenged provisions are not supported by a compelling interest in protecting children from harmful material.[35] That concern is exceeded by the CPPA because it bans constitutionally-protected material in which no actual children are depicted.

This Court has made it clear that the government's interest in regulating child pornography – as compelling as it may be – is "limited to works that *visually* depict sexual conduct *by children below a specified age.*"[36] So Congress' interest in regulating child pornography is limited to restricting material that contains visual depictions of *actual children* engaged in sexual conduct – not depictions of young-looking adults, or computer-generated images of young-looking nonpersons. And since the challenged provisions of the CPPA forbid materials in which no actual children are depicted, there can be no compelling

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[34] *Butler*, 352 U.S. at 383-84.

[35] *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

[36] *Ferber*, 458 U.S. at 764 (footnotes omitted) (second emphasis added).

governmental interest. The CPPA's ban on sexually-explicit adult materials is simply not justified.

In sum, the CPPA cannot withstand the rigors of strict scrutiny analysis because it is not narrowly tailored to support a compelling governmental interest. As a matter of law, the CPPA is an unconstitutional restriction on protected speech.

B. The CPPA is unconstitutionally vague

Under the void-for-vagueness doctrine, the Due Process Clause of the Fifth Amendment is violated in two ways. The first transgression occurs when statutes do not give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. These rules fail to provide fair warning to those who wish to act lawfully.[37] The Due Process Clause is again breached when legislation impermissibly delegates fundamental questions of policy to law enforcement officials. This permits unbridled and discretionary enforcement of the law.[38] Both situations exist in the instant case.

The CPPA fails to define the terms and phrases that are necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. Its highly subjective – yet key phrases – *appears to be* and *conveys the impression* are nowhere explained.[39] Persons are left to puzzle: "Appears to whom to be a minor?" "Conveys to

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[37] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (citations omitted).

[38] *Id.*

[39] 18 U.S.C. § 2256 (8)(B), (D).

whom the impression that a minor is depicted?" "How does a minor appear?" "Is the individual depicted really a minor?" "Does it matter?" Without any demarcation, no one can be sure what these phrases actually mean, particularly since age – as with beauty – is in the eye of the beholder. An apt illustration of this quandary was encountered in *American Liberty Ass'n v. Reno*, where the D.C. Circuit recognized the difficulty in distinguishing, based on appearance alone, whether performers are fourteen or eighteen, seventeen or twenty-one.[40]

The failure to provide definitions to these principal phrases also has the egregious effect of giving law enforcement officials unbridled discretion in enforcing the CPPA. The bare expressions allow officials to determine whether an adult depicted in a sexually-explicit work "appears to be a minor," or whether a portrayal "conveys the impression" that a minor is engaging in sexually-explicit conduct.

For example, a U.S. Senator has characterized *safe-sex* educational materials as obscene.[41] And a federal court has classified some visual depictions of fully-clothed persons as "sexually explicit."[42] One can only imagine the

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[40] *American Liberty Ass'n v. Reno*, 33 F.3d 78, 90 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 2610 (1995) (citations omitted).

[41] Senator Jesse Helms (R-NC) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14203 (Oct. 14, 1987).

[42] *United States v. Knox*, 32 F.3d 733 (3d Cir.1994), *cert. denied*, 115 S.Ct. 897 (1995) (where the court opined that the phrase, "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well).

types of materials that law enforcement officials will label criminal using the formless phrases *appears to be a minor* and *conveys the impression of a minor*.

Even assuming that the entire concept of prohibiting sexually-explicit visual depictions of youthful adults is constitutional under the First Amendment, the CPPA is nonetheless unconstitutionally vague under the Due Process Clause of the Fifth Amendment.

C. The CPPA is unconstitutionally overbroad

Legislation regulating speech is unconstitutionally overbroad when it includes within its prohibitions – not only activity that can legitimately be prohibited – but also activity that is constitutionally protected by the First Amendment.[43]

The CPPA's plain language – which forbids visual depictions of adults and computer-generated nonpersons who *appear to be minors*, and promotional materials that *convey the impression* that they are depictions of minors – is unconstitutionally overbroad because it impermissibly suppresses material that is protected by the First Amendment.[44] The CPPA flies directly in the face of Supreme Court precedent. In *Ferber*, the Court held that if the visual depiction of sexual activity by minors "[is] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be

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[43] *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

[44] *See Reno v. ACLU*, 117 S.Ct. at 2346.

utilized."[45] So what *appears to be a minor*, or something which *conveys that impression*, is obviously safeguarded.

D. Conclusion

Under the guise of protecting children, Congress has cast its legislative net far beyond the permissible waters of child pornography. It now invades the sanctuary of protected speech. As a result, the new movie version of *Lolita* could well be labeled "child pornography," even though an adult body-double was used to simulate the minor who engaged in the sexual activity. And that is exactly what *Lolita* is about – a man's sexual obsession with a pubescent girl. Balthus' painting *The Guitar Lesson* might also fall prey to the CPPA, as would some renditions of *Romeo and Juliet*. Even Jock Sturges' photographs of nude children will be snared if they are considered a "lascivious exhibition of the genitals or pubic area."

Viewing certain kinds of images does not cause the commission of sexual crimes against children, any more than religion causes violence. The Bible is replete with extremely violent acts, some of which are cited by frenzied criminals as their inspiration. Silencing movies like *Lolita* will not eliminate pedophilia, which has long-existed in both permissive and repressive cultures. If disturbing images could be prohibited because someone might use them as an excuse to engage in criminal conduct, movies about revolution, murder, and lynching would be forbidden.

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[45] *Ferber*, 458 U.S. at 763-64.

The CPPA is simply too far-reaching to pass constitutional muster. Peebles' conviction should be reversed and the prosecution dismissed.

II. Peebles did not waive his right to contest the constitutionality of the Texas Sex Offender Registration Program

Peebles challenged the constitutionality of the Texas Sex Offender Registration Program on several grounds. But the Fifth Circuit refused to confront these claims, instead deciding that "Peebles validly waived any appeal of his sentence except for an upward departure from the guidelines."[46] Did the Fifth Circuit properly construe the concept of appeal waiver? And does its decision conflict with those from the Fourth Circuit?

A. Waiver

1. There was no appeal waiver

Peebles preserved his right to contest the constitutionality of the CPPA on appeal. The objection was raised in a Motion to Dismiss, which was filed and argued well before Peebles pleaded guilty. And when he did enter his plea, the trial court specifically acknowledged that Peebles was not waiving his right to appeal the court's ruling on the Motion to Dismiss. This much cannot be disputed. It is even memorialized in the written agreement.

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[46] Appendix at 2 (citations omitted).

The plea agreement provides that Peebles waives his right

> . . . to appeal the sentence or the manner in which it was determined on the grounds set forth in Title 18 [U.S.C. §] 3742 except only that he may appeal any upward departure from the sentencing guidelines not requested by the United States and *the denial of the pretrial Motion to Dismiss.*"[47]

It is not mere happenstance that the Plea Agreement speaks about the sentence and the Motion to Dismiss in the same breath. If the CPPA is held unconstitutional, there can be no sentence – and obviously no sex offender reporting requirement. But for the one, there cannot be the other. So Peebles' right to argue the CPPA's constitutionality, naturally portends his ability to debate the validity of the sex offender registration program. It is, at bottom, part and parcel of the same thing.

Under the express terms of the plea agreement, Peebles preserved his right to contest the constitutionality of the CPPA. And that dispute naturally encompasses his challenge to the Texas Sex Offender Registration Program. The Fifth Circuit should not have summarily dismissed his claims.

2. And if there was a waiver . . .

Valid appeal waivers will not foreclose appellate review of every sentence. "[A] defendant could not be said to have waived his right to appeal review of a

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[47] Appendix at 11, ¶ 10 (emphasis added).

sentence imposed *in excess of the maximum penalty provided by statute* or based on a *constitutionally impermissible* factor such as race."[48] Nor does it bar review of constitutional attacks, such as a Sixth Amendment challenge to the plea proceedings.[49]

An example of this principle can be found in *United States v. Broughton-Jones*.[50] The defendant in that case pleaded guilty to perjury. As part of the sentence, she was required to pay $25,000 in restitution.[51] This restitution order was contested on appeal as not being authorized by the Victim and Witness Protection Act (VWPA).[52]

The Court first determined that the defendant's appeal waiver was valid.[53] It then addressed "whether her challenge to the district court's sentence – that it was not authorized by the VWPA – falls within the scope of her appeal waiver."[54] This inquiry was answered by drawing from the teachings in *Marin*,[55] which makes waivers inapplicable to sentences "imposed in excess of

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[48] *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (emphasis added).

[49] *United States v. Attar*, 38 F.3d 727, 732-33 (4th Cir. 1994).

[50] *United States v. Broughton-Jones*, 71 F.3d 1143 (4th Cir. 1995).

[51] *Id.* at 1145.

[52] *Id.* at 1146.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1147, citing *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992).

the maximum penalty provided by statute."[56] And "sentences of imprisonment that exceed the statutory maximum surely are such."[57]

Relying on this logic, the *Broughton-Jones* court found that a restitution order not authorized by the VWPA "is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum, . . . "[58] "Appeals challenging the legality of restitution orders are [therefore] outside the scope of a defendant's otherwise valid appeal waiver."[59] And if something so modest as a restitution order is not amenable to an appeal waiver, then certainly a command whose footing is constitutionally unsure is likewise excused.

Peebles' assault on the Texas reporting requirement is pervasive, invoking fundamental precepts of due process, equal protection, and proportionality. Restitution orders pale in comparison to such interests. The unconstitutional registration demand "is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum, . . . "[60] The liberty interests at stake are therefore outside the scope of any appeal waiver.

Whether Peebles surrendered the right to pursue his constitutional protests, is an issue of exceptional importance. Equally certain is that the Fifth Circuit's disposition of this inquiry squarely clashes with the Fourth

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[56] *Broughton-Jones*, 71 F.3d at 1147, quoting *Marin*.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

Circuit's decisions in *Broughton-Jones* and *Marin*. Review should be granted so that this conflict can be dispelled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GAITHER & AMANN

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Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20872
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM KENNETH PEEBLES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CR-3-1

(Filed Oct. 16, 2001)

Before JOLLY, HIGGINBOTHAM, and PARKER, Circuit Judges.

PER CURIAM:*

William Kenneth Peebles appeals his conditional guilty-plea conviction and sentence for possession of child pornography.

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* Pursuant to 5TH CIR. R. 47.5, the court had determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

In accordance with the reservation of rights in his plea agreement, Peebles contends that the definition of "child pornography" in the Child Pornography Protection Act (CPPA) is unconstitutionally overbroad and vague because it includes any visual depiction that "*appears to be*, of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(B) (emphasis added). Peebles concedes that this argument is foreclosed by *United States v. Fox*, 248 F.3d 394, 403-07 (5th Cir. 2001), which held the definition not to be overbroad or vague. Peebles raises the issue only to preserve it for possible Supreme Court review.

Peebles contends there is no factual basis for his plea because the record does not establish that the pornographic images were "transported in interstate or foreign commerce." *See* 18 U.S.C. § 2252A(a)(2). The factual basis written into the plea agreement and established at the plea hearing showed that Peebles downloaded the images onto a computer and through a network server that transmitted the images across state lines. The district court complied with Rule 11(f) by "making such inquiry as [satisfied] it that there is a factual basis for the plea," Fed. R. Crim. P. 11(f).

Peebles challenges the special condition of supervised release that requires him to register as a sex offender in accordance with state law. Peebles validly waived any appeal of his sentence except for an upward departure from the guidelines. *See* Fed. R. Crim. P. 11(c)(6); *see United States v. Robinson*, 187 F.3d 516, 518 (5th Cir. 1999). The district court was required by 18 U.S.C. § 3583(d) to make sex-offender registration a condition of Peebles's supervised release. Therefore the

requirement was not an "upward departure," and Peebles therefore waived his right to appeal it.

The conviction and sentence are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20872
Summary Calendar

D.C. Docket No. H-00-CR-3-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM KENNETH PEEBLES,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas, Houston.

(Filed Oct. 16, 2001)

Before JOLLY, HIGGINBOTHAM, and PARKER, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the sentence and conviction of the District Court are affirmed.

ISSUED AS MANDATE: NOV 07 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	**CRIMINAL NO.**
v.	§	**H-00-3**
WILLIAM KENNETH PEEBLES	§	

INDICTMENT

(Filed 1/5/00)

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about September 16, 1999, in the Houston Division of the Southern District of Texas and elsewhere,

WILLIAM KENNETH PEEBLES,

did knowingly possess a computer with internal hard drive and other material that contained three (3) or more images of child pornography that have been mailed, and shipped and transported in interstate and foreign commerce by any means, including by computer, and that was produced using materials that have been mailed, and shipped and transported in interstate or foreign commerce by any means, including by computer.

In violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2256.

TRUE BILL:

/s/ J. Stanley [Illegible]
FOREPERSON OF THE
GRAND JURY

APPROVED:

MERVYN M. MOSBACKER
United States Attorney

BY: /s/ Eric D. Smith
ERIC D. SMITH
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO. H-00-003
	§	Judge Lee H. Rosenthal
v.	§	
	§	
WILLIAM KENNETH PEEBLES	§	
	§	

PLEA AGREEMENT

(Filed May 10, 2000)

COMES NOW the United States of America, by and through its attorneys Mervyn M. Mosbacker, United States Attorney for the Southern District of Texas and Eric D. Smith, Assistant United States Attorney, and the defendant, WILLIAM KENNETH PEEBLES, and the defendant's counsel, Rick Brass, pursuant to rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure, and state that they have entered into an agreement, the terms and conditions of which are as follows:

TERMS OF THE AGREEMENT

1. The defendant, WILLIAM KENNETH PEEBLES agrees to plead guilty to Count One of the indictment in this case and to persist with that plea through sentencing. Count One charges the defendant with Possession of child pornography in violation of Title 18 U.S.C. §2252A(a)(B)(5).

2. As part of this agreement and in exchange for the defendant's guilty plea and if the defendant persists in his plea of guilty through sentencing, the United States agrees not to oppose the defendant being afforded a reduction for acceptance of responsibility. The United States will also not oppose the defendant being sentenced to the lower end of the guideline in which he falls. The United States also agrees that there is no evidence of distribution of child pornography.

3. The United States agrees that it will not further criminally prosecute the defendant in the Southern District of Texas for any other Title 18 violations arising from conduct charged in the criminal indictment. This plea agreement binds only the United States Attorney's Office for the Southern District of Texas and the defendant; it does not bind any other United States Attorney. Although the United States Attorney's office is not aware of any other investigations being conducted on William Kenneth Peebles at this time, he understands that the United States Attorney's Office for the Southern district of Texas cannot at this point decline any possible prosecutions for Title 26 offenses. The United States will bring this plea agreement and the full extent of the defendant's cooperation to the attention of other prosecuting offices, if requested.

PENALTY

4. The penalty for a violation of Title 18, United States Code, Section 2252A(a)(B)(5) is a maximum of fifteen (15) years and/or a fine of $250,000; and a period of supervised release of a [sic] not more than three (3) years.

SUPERVISED RELEASE

5. The defendant also acknowledges and understands that if he should violate the conditions of any period of supervised release which may be imposed as part of his sentence, then the defendant may be imprisoned for up to the entire term of supervised release without credit for time already served on the term of supervised release prior to such violation. Further, the defendant is not eligible for parole.

ASSESSMENT

6. Prior to or at the time of sentencing, the defendant will pay to the United States Department of Justice a special assessment in the amount of one hundred dollars ($100.00) per count of conviction, as required in Title 18, United States Code, Section 3013(a)(2)(A). The payment will be by certified check payable to Clerk of the Court for the Southern District of Texas, P. O. Box 61010, Houston, Texas 77208.

FINE AND RESTITUTION

7. The defendant understands that the Court is permitted, pursuant to Section 5E1.2(d)(7) of the *Sentencing Guidelines and Policy Statements*, to order the defendant to pay a fine that is sufficient to reimburse the government for the costs of any imprisonment, term of supervised release and probation, if any are ordered.

8. The defendant agrees that any fine or restitution imposed by the Court will be due and payable immediately.

9. The defendant agrees to file a sworn financial affidavit that any fine or restitution imposed by the Court

will be due and payable immediately. The defendant also agrees not to attempt to avoid paying any fine or restitution imposed by the Court through any proceeding pursuant to the United States Bankruptcy Code. The defendant hereby waives all rights, if any, to obtain discharge or to delay payment of any fine or restitution obligation or alter the time for payment by filing a petition pursuant to the Bankruptcy Code. The defendant hereby stipulates that enforcement of any fine or restitution obligation by the United States or a victim is not barred or affected by the automatic stay provisions of the United States Bankruptcy Code (Title 11, United States Code, Section 362 and that enforcement of any fine or restitution obligation by the United States is a valid exercise of its police or regulatory power within the meaning of Title II, United States Code, Section 362(b). The defendant hereby stipulates and agrees not to institute or participate in any proceeding to interfere with, alter, or bar enforcement of any fine or restitution obligation pursuant to the automatic stay or other provision of the Bankruptcy Code in any case filed by the defendant or the defendant's creditors. Upon request of the United States or the victim, the defendant will execute an order or stipulation granting the United States or the victim relief from the automatic stay or other Bankruptcy Code provisions in order to enforce any fine or restitution obligation. The defendant hereby stipulates that any fine or restitution obligation imposed by the Court is not dischargeable in any case commenced by the defendant or the defendant's creditors pursuant to the Bankruptcy Code. The defendant's waivers and stipulations or agreements set forth above are made in exchange for the United States' concessions set forth in this plea agreement.

WAIVER OF APPEAL AND SENTENCE DETERMINATION

10. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Knowing that, the defendant waives the right to appeal the sentence or the manner in which it was determined on the grounds set forth in Title 18 United States Code, Section 3742 except only that he may appeal any upward departure from the sentencing guidelines not requested by the United States and the denial of the pretrial Motion to Dismiss. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b).

11. The defendant is also aware that the United States Constitution and the laws of the United States, including Title 28, United States Code, Section 2255, afford a defendant the right to contest or 'collaterally attack' a conviction or sentence after the conviction or sentence has become final. Knowing that, the defendant waives his right to contest or collaterally attack his conviction or sentence by means of any post-conviction proceeding except regarding the denial of the pretrial Motion to Dismiss.

12. In agreeing to this waiver, the defendant is aware that a sentence has not yet been determined by the Court. The defendant is also aware that any estimate of the probable sentencing range under the sentencing guidelines, to include Rule 410 "Off the Record" discussion of possible offense levels or criminal history categories, that the defendant may have received from the

defendant's counsel, the United States or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office or the Court. The United States does not make any promise or representation concerning exactly or possibly what sentence the defendant will receive. Realizing the uncertainty in estimating what sentence the defendant will ultimately receive, the defendant knowingly waives the right to appeal as set forth above in exchange for the concessions made by the United States in this plea agreement. The defendant nonetheless acknowledges and agrees that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offenses to which the defendant pleads guilty.

13. The defendant understands that the sentence to be imposed is within the discretion of the sentencing judge. If the Court should impose any sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw a guilty plea and will remain bound to fulfill all of the obligations under this plea agreement. In accord with this agreement, he waives all rights he has or may acquire under the "Hyde Amendment" to the Department of Justice's Appropriations bill (H.R. 2267) for fiscal year 1998, including any implementing regulation or rule (collectively referred to herein as the "Hyde Amendment"), to recovery of attorney's fees and other litigation expenses related to any investigation or prosecution of the charges alleged in the Criminal Indictment, and to any transactions or conduct related to, arising from or associated with that charge. Defendant agrees that he will not file any motion, request or other cause of action, nor will he request, authorize or allow

any other person to file or make any such motion, request or other cause of action on his behalf pursuant to the Hyde Amendment.

14. The United States reserves the right to carry out its responsibilities under guidelines sentencing. Specifically, the United States reserves the right: (a) to bring its version of the facts of this case, including its file and any investigative files, to the attention of the Probation Office in connection with that office's preparation of a presentence report; (b) to dispute sentencing factors or facts material to sentencing; (c) to seek resolution of such factors or facts in conference with defendant's counsel and the Probation Office; and (d) to file a pleading relating to these issues, in accordance with Section 6A1.2 of the *Sentencing Guidelines and Policy Statements.*

15. The defendant represents to the Court that defendant is satisfied that his attorney has rendered effective assistance. Defendant understands that by entering into this Agreement, he surrenders certain rights as provided in this Agreement. Defendant understands that the rights of defendants include the following:

a. If the defendant persisted in a plea of not guilty to the charges, defendant would have the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States and the court all agree.

b. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and his attorney would be able to cross-examine them. In turn, the defendant could, but

would not be required to, present witnesses and other evidence on his own behalf. If the witnesses for the defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.

c. At a trial, the defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the defendant desired to do so, he could testify on his own behalf.

16. The defendant understands that nothing in this plea agreement, however, will restrict access by the Probation Office or the Court to information and records in the possession of the United States, including that obtained from the defendant.

17. Defendant will plead guilty because he is in fact guilty of the charge contained in the Indictment. In pleading guilty to the indictment, the defendant acknowledges the facts as stated below are true, and were the case to go to trial, the government would be able to prove those facts beyond a reasonable doubt. The parties further agree, however, that this factual basis does not include all relevant conduct that may be considered by the Court for sentencing purposes.

Factual Basis

The evidence will establish the following factual basis for the charges contained in the Indictment:

On September 9, 1999, John Kessler, Corporate Security, Shell Oil Company, Houston, Texas,

contacted the Federal Bureau of Investigation to notify that an employee, Williams [sic] Kenneth Peebles, is downloading child pornography from the Internet onto his computer at work. Peebles has worked for Coral Energy, a subsidiary of Shell, also located in Houston, Texas, since 1990 as an engineer. Peebles has been a model employee.

On September 1, 1999, Lance Kleinpeter, Manager of Networks, coral Energy, within their policies and procedures, was conducting a random security check on their computer network when he discovered the names of news groups which Peebles had visited. These news groups contained names such as alt.bianaries.pictures.erotica.pre-teen. Kleinpeter further investigated and discovered what he considered to be child pornography which traced back to the work station of Peebles. There were photographs of nude children as well as children involved in sexual acts.

On September 13, 1999, Kessler provided four floppy diskettes containing over eighty photographs to SA Wilkins. These photographs were recovered from the network server by Kleinpeter and traced to the work space of Peebles. SA Wilkins viewed the photographs and determined through experience that the children were likely under twelve years of age.

On September 16, 1999, a search warrant was executed at the cubicle of William Kenneth Peebles and his computer was seized, along with a video camera and monitor. Peebles was interviewed and gave a confession of his activity in regards to downloading child pornography.

> On October 12, 1999, SA Wilkins examined a copy of the computer hard drive used by Peebles. The hard drive contained over 350 photographs, and 8 videos of nude children and children involved in sexual acts. These photos are in addition [sic] those found on the network server. Through experience SA Wilkins determined that the majority of children were under the age of twelve.

18. This written agreement constitutes the complete plea agreement between the United States, the defendant, and the defendant's counsel. No promises or representations have been made by the United States excepts [sic] as set forth in writing in this plea agreement. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

/s/ William Kenneth Peebles
WILLIAM KENNETH
PEEBLES, DEFENDANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 10th DAY OF May, 2000.

MICHAEL N. MILBY, Clerk

By: /s/ June Canulla
Deputy Clerk

APPROVED:

/s/ E.D.S.
Eric D. Smith
Assistant U.S. Attorney

/s/ Rick Brass
Rick Brass
Attorney for Defendant

I have consulted with my counsel and fully understand all my rights with respect to the indictment pending against me and I understand the elements of the offenses charged against me. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the *Sentencing Guidelines and Policy Statements* which may apply in my case. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and I am entering this agreement and plea of guilty freely and voluntarily in the exercise of my own good judgment, because I am guilty.

Date: May 10, 2000 /s/ William Kenneth Peebles
WILLIAM KENNETH
PEEBLES, Defendant

I have fully explained to the defendant, his rights with respect to the pending indictment. Further, I have reviewed the provisions of the Sentencing Guidelines and Policy Statements and I have fully explained to the defendant the provisions of those Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with the defendant. To my knowledge,

the defendant's decision to enter into this agreement is an informed and voluntary one.

Date: 5/10/00 /s/ Rick Brass
RICK BRASS
Attorney for Defendant

United States District Court

Southern District of Texas

Holding Session In Houston

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

9/26/00
MICHAEL N. MILBY, CLERK

UNITED STATES OF AMERICA v. WILLIAM KENNETH PEEBLES	JUDGEMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) Case Number: 4:00CR00003-001 Rick Brass Defendant's Attorney

[ ] See Additional Aliases – Sheet

THE DEFENDANT:

[✓] pleaded guilty to count(s) 1 on May 10, 2000

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court

[ ] was found guilty on count(s) _____ after a plea of not guilty

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2252A(a)(5)(B) and 2256	Possession of child pornography	09/16/1999	1

See Additional Counts of Conviction – Sheet

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security No.: 450-84-1212

Defendant's Date of Birth: 03/08/1947

Defendant's USM No.: 87990-079

Defendant's Residence Address:

923 Sandpiper

Sugarland TX 77478

Defendant's Mailing Address:

923 Sandpiper

Sugarland TX 77478

September 19, 2000
Date of Imposition of Judgment

/s/ Lee H. Rosenthal
Signature of Judicial Officer

LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

September 25, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term 18 month(s).

The term consists of EIGHTEEN (18) MONTHS as to Count 1.

[ ] See Additional Imprisonment Terms – Sheet

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district

[ ] _____ on _____

[ ] as notified by the United States Marshal.

[✓] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] by 2 p.m. on _____

[✓] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrjal Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised relase for a term of 3 year(s).

The term consists of THREE (3) YEARS as to Count 1.

[ ] See Additional Supervised Release Terms – Sheet

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The

[✓] See Special Conditions of Supervision – Sheet 3

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. § 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. § 3013;

15) the defendant shall notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall register with the sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency

personally for additional processing, such as photographing and fingerprinting.

The defendant is required to participate in a mental health program, specifically for sex offenders as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such program, based on ability to pay as determined by the probation officer.

The defendant shall not possess a computer or obtain access to any computer system outside of that required for employment. Should he have access to a computer for employment, he is prohibited from accessing or using the internet during his term of supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$100.00	$5,000.00	

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... _____

[ ] See Additional terms for Criminal Monetary Penalties – Sheet

FINE

[ ] The above fine includes costs of incarceration and/or supervision in the amount of $0.00

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived

[ ] The interest requirement is modified as follows

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$0.00	$0.00	

[ ] See Additional Victims

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for

offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

A [ ] in full immediately; or

B [✓] $5,100.00 immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [✓] in installments to commence 30 day(s) after the date of this judgment.

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

[ ] Joint and Several

Case Number (Including Defendant No.)	Defendant Name	Joint and Several Amount

[ ] See Additional Joint & Several Defendants

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

[ ] See Additional Forfeited Property – Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibilities Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[✓] The Court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The Court adopts the factual findings and guideline application in the presentence report except:

[ ] See Additional Findings and Guideline application Exceptions – Sheet

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: 1

Imprisonment Range: 27 to 33 months.

Supervised Release Range: 2 to 3 years.

Fine Range: $6,000.00 to $60,000.00

[✓] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, 113A, of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of

[ ] Partial or no restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

[ ] See Additional Reasons for Point Within Range – Sheet

OR

[✓] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[✓] for the following specific reason(s):

Pursuant to U.S.S.G. § 5K2.0 the Court departs downward. As a result of a combination of factors, including the defendant's extraordinary rehabilitation efforts and obsessive compulsive disorder. This is further supported under U.S.S.G. § 5K2.13 (diminished mental capacity).

[ ] See Additional Reasons For Departure From The Guideline Range – Sheet

Supreme Court, U.S.
MAR

No. 01-1058

In the Supreme Court of the United States

WILLIAM KENNETH PEEBLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" or that "is advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) and (D) (Supp. V 1999), violates the First Amendment.

2. Whether petitioner waived his right to challenge a special condition of supervised release requiring him to register as a sex offender in accordance with state law.

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In the Supreme Court of the United States

No. 01-1058

WILLIAM KENNETH PEEBLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 275 F.3d 46 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 4) was entered on October 16, 2001. The petition for a writ of certiorari was filed on January 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of a conditional plea of guilty in the United States District Court for the Southern

District of Texas, petitioner was convicted of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. V 1999). Pet. App. 19-20. He was sentenced to a term of imprisonment of 18 months, to be followed by three years of supervised release. *Id.* at 21-22. As a condition of supervised release, he was ordered to participate in a mental health program designed for the treatment of sex offenders and, pursuant to 18 U.S.C. 3583(d) (1994 & Supp. V 1999), to register with the sex offender registration agency in any State in which he resided or was employed. Pet. App. 2, 25-26. The court of appeals affirmed. *Id.* at 1-3.

1. In 1990, petitioner began working as an engineer for Coral Energy, a subsidiary of Shell Oil Company in Houston, Texas. Pet. App. 15. In early September 1999, a random security check of Coral Energy's computer network revealed that petitioner had visited child pornography sites on his computer and downloaded photographs of nude children and children involved in explicit sexual acts. *Ibid.* The company provided diskettes containing over 80 photographs to the FBI, which determined that the children were likely under twelve years of age. *Ibid.*

On September 16, 1999, the FBI executed a search warrant at petitioner's work station and seized petitioner's computer, a video camera, and monitor. Pet. App. 15. Petitioner confessed to downloading child pornography. *Ibid.* A subsequent search of petitioner's computer hard drive revealed over 350 photographs and eight videos of nude children and children involved in sexual acts. *Id.* at 16. These photos were in addition to those found on the network server. *Ibid.* The FBI determined that the majority of children in these photos were also under the age of twelve. *Ibid.*

2. Petitioner was indicted on one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. V 1999). The Child Pornography Prevention Act of 1996 (CPPA) defines child pornography to include "any visual depiction, including any * * * computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8) and (8)(B) (Supp. V 1999), and any "visual depiction * * * advertised, promoted, presented, described, or distributed in * * * a manner that conveys the impression that the material * * * contains a visual depiction of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(D) (Supp. V 1999).[1]

Petitioner moved to dismiss the indictment on the ground that the statute was vague and overbroad and therefore violative of the First Amendment. Gov't C.A. Br. 3. The district court denied the motion. *Ibid.*

Petitioner thereafter entered into a plea agreement pursuant to which he preserved his right to challenge the constitutionality of 18 U.S.C. 2252A and 2256(8) (Supp. V 1999). Pet. App. 11; 5/10/00 Tr. 20-21. Under the terms of the agreement, he expressly waived the right to appeal his sentence or the manner in which it was determined, either on direct appeal or in a post-conviction proceeding, other than for an upward departure from the sentencing guidelines. Pet. App. 11-12.[2] In return, the government agreed not to oppose a

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[1] The CPPA also defines child pornography to include any visual depiction the production of which "involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999), and any "visual depiction * * * created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999).

[2] The plea agreement provided as follows:

reduction in petitioner's offense level for acceptance of responsibility, nor to oppose a sentence at the lower end of the Guidelines' range. *Id.* at 8.

At the plea hearing, the district court reviewed the agreement with petitioner, including his waiver of appellate rights. 5/10/00 Tr. 15-16. The court accepted petitioner's guilty plea only after ensuring that petitioner understood that he was waiving, among other things, his right to challenge his sentence, other than a sentence above the statutory maximum or an upward departure from the Guidelines. *Id.* at 10, 15-17, 19-20. The court further explained that if petitioner was sentenced to prison, petitioner would be placed on supervised release and subject to the restrictions and conditions of that supervision. Petitioner stated that he understood. *Id.* at 13- 14.

The Presentence Investigation Report (PSR) that was subsequently prepared explained that, pursuant to 18 U.S.C. 3583(d) (1994 & Supp. V 1999), the court was required to impose as a condition of supervised release that petitioner register as a sex offender with law enforcement authorities. PSR 14 para. 63.

> [Petitioner] waives the right to appeal the sentence or the manner in which it was determined on the grounds set forth in Title 18 United States Code, Section 3742 except only that he may appeal any upward departure from the sentencing guidelines not requested by the United States and the denial of the pretrial Motion to Dismiss. * * *
>
> * * * * *
>
> [Petitioner] waives his right to contest or collaterally attack his conviction or sentence by means of any post-conviction proceeding except regarding the denial of the pretrial Motion to Dismiss.
>
> Pet. App. 11.

At sentencing, the district court granted petitioner a three-level reduction in offense level for acceptance of responsibility. Gov't C.A. Br. 3; Pet. App. 29. The resulting Guidelines' range of imprisonment was 27 to 33 months. *Id.* at 30. The court granted petitioner's motion for a downward departure and sentenced him to a term of imprisonment of 18 months, to be followed by a three-year term of supervised release. *Id.* at 21-22, 31. The court further ordered that petitioner participate in a mental health program designed for the treatment of sex offenders, and, pursuant to 18 U.S.C. 3583(d) (1994 & Supp. V 1999), ordered that petitioner register with the sex offender registration agency in any State in which petitioner resided or was employed. Pet. App. 25-26; Gov't C.A. Br. 3-4. Petitioner does not contend that he objected to the terms of his supervised release.

3. Petitioner appealed both his conviction and sentence. Pet. App. 1. He renewed his First Amendment challenge to 18 U.S.C. 2256(8)(B) (Supp. V 1999). Pet. App. 2. He also argued that there was no factual basis for his plea because the record failed to establish that the pornographic images were "transported in interstate or foreign commerce." *Ibid.* Finally, he argued that the special condition of supervised release requiring him to register as a sex offender violated the Eighth Amendment's proscription against cruel and unusual punishment, was void for vagueness, and violated the substantive due process and equal protection requirements of the Fourteenth Amendment. Pet. C.A. Br. 25-57.

4. The court of appeals affirmed. Pet. App. 1-3. The court rejected petitioner's constitutional challenge to Section 2252A. The court noted that petitioner conceded that his claim was foreclosed by the court of

appeals' earlier decision in *United States* v. *Fox*, 248 F.3d 394, 406-407 (5th Cir. 2001), petition for cert. pending, No. 01-805 (filed Aug. 20, 2001), which held that Section 2252A is neither unconstitutionally overbroad nor vague. Pet. App. 2.

The court also rejected petitioner's claim that there was no factual basis for his plea. The court found that the factual basis written into the plea agreement and established at the plea hearing showed that petitioner "downloaded the [pornographic] images onto a computer and through a network server that transmitted the images across state lines." Pet. App. 2.

Finally, the court rejected petitioner's challenge to the special condition of supervised release requiring him to register as a sex offender in accordance with state law, finding that petitioner had "validly waived any appeal of his sentence except for an upward departure from the guidelines." Pet. App. 2. The court found that because the district court was required by 18 U.S.C. 3583(d) (1994 & Supp. V 1999) to impose sex-offender registration as a condition of petitioner's supervised release, the registration was not an "upward departure" that petitioner could appeal. Pet. App. 2-3.

DISCUSSION

1. Relying on *Free Speech Coalition* v. *Reno*, 198 F.3d 1083 (9th Cir. 1999), petitioner contends that the definition of child pornography governing Section 2252A is unconstitutionally vague and overbroad because it includes depictions of sexually explicit conduct by persons who appear to be minors and depictions presented in a manner that conveys the impression that the depictions are of minors engaged in sexually explicit conduct. Pet. 5-6, 8-16. Petitioner argues that his conviction under that statute should be set aside and the

indictment dismissed. As petitioner observes (Pet. 4), while this case was on appeal, the Court granted the government's petition for a writ of certiorari in *Free Speech Coalition*, *supra*, now styled *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution as is presented in this petition. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

2. Petitioner also argues that the waiver-of-appellate-rights provision in his plea agreement did not preclude him from challenging the constitutionality of Texas's sex offender registration program. Pet. 6-8, 16-20. Petitioner's argument is that his preservation under the plea agreement of his right to challenge the constitutionality of the CPPA necessarily encompasses the right to challenge the terms of his supervised release that he register as a sex offender. Petitioner reasons that if the CPPA is held unconstitutional, he cannot be sentenced under the Act, and there can be no terms of supervised release.

Under the specific terms of his plea agreement, however, petitioner preserved only the right to challenge the constitutionality of the CPPA. Should this Court hold in *Free Speech Coalition* that the CPPA is unconstitutional, petitioner's sentence, including the terms of his supervised release, will have to be vacated—not because of any constitutional infirmity in Texas's sex offender registration program, but because of the invalidity of petitioner's underlying conviction. The preservation of petitioner's right to challenge the constitutionality of the CPPA, however, did not preserve the right to mount an independent challenge to petitioner's sentence—in particular to the constitutionality of Texas's sex offender registration program. Under

petitioner's analysis, a defendant's preservation of his right to appeal his conviction on one ground would necessarily, and in all instances, also preserve his right to appeal his sentence on *any* ground despite an express waiver of such right. Such clearly is not the case.

a. This Court has held repeatedly that a defendant may validly waive constitutional and statutory rights as part of the plea bargaining process. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-202 (1995) (explaining that "many of the most fundamental protections afforded by the Constitution" may be waived and that statutory rights are presumptively waivable); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). Applying that principle, the courts of appeals have consistently enforced voluntary and knowing waivers of the right to appeal a sentence. See, *e.g.*, *Jones* v. *United States*, 167 F.3d 1142, 1144 (7th Cir. 1999); *United States* v. *Atterberry*, 144 F.3d 1299, 1300-1301 (10th Cir. 1998); *United States* v. *Michelsen*, 141 F.3d 867, 871-873 (8th Cir.), cert. denied, 525 U.S. 942 (1998); *United States* v. *Ashe*, 47 F.3d 770, 775-776 (6th Cir.), cert. denied, 516 U.S. 859 (1995); *United States* v. *DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992), cert. denied, 513 U.S. 1128 (1995); *United States* v. *Salcido-Contreras*, 990 F.2d 51 (2d Cir.) (per curiam), cert. denied, 509 U.S. 931 (1993); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States* v. *Marin*, 961 F.2d 493, 495-496 (4th Cir. 1992).

The courts of appeals have recognized certain circumstances in which defendants who have signed waivers of rights to appeal retain the right to appellate review on limited grounds. *United States* v. *Ready*, 82 F.3d 551, 555-556 (2d Cir. 1996); *United States* v. *Johnson*, 67 F.3d 200, 202 & n.4 (9th Cir. 1995). For example, appellate review is available if the plea agreement is

involuntary, see, *e.g.*, *United States* v. *Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); if the sentence is imposed in excess of the statutory maximum penalty, see, *e.g.*, *United States* v. *Broughton-Jones*, 71 F.3d 1143, 1146-1147 (4th Cir. 1995); *United States* v. *Attar*, 38 F.3d 727, 732 (4th Cir. 1994), cert. denied, 514 U.S. 1107 (1995); if the sentencing court relies on a constitutionally impermissible factor, such as race, see, *e.g.*, *United States* v. *Hicks*, 129 F.3d 376, 377 (7th Cir. 1997); or if the sentence imposed is not in accordance with the negotiated agreement, see, *e.g.*, *United States* v. *Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992).

Petitioner attempts to fit within this limited class by arguing that Texas's sex offender registration program is unconstitutional. Petitioner, however, cites no case, and we are aware of none, finding Texas's program to be unconstitutional. Indeed, the courts have routinely upheld against constitutional attack Texas's sex offender registration program. See, *e.g.*, *Creekmore* v. *Attorney Gen.*, 138 F. Supp. 2d 795 (E.D. Tex. 2001) (rejecting claim that Texas Sex offender Registration Program violated procedural due process); *Dean* v. *State*, 60 S.W.3d 217 (Tex. Ct. App. 2001) (rejecting ex post facto challenge to Texas Sex Offender Registration Program); *Gone* v. *State*, 54 S.W.3d 27, 36-37 (Tex. Ct. App. 2001) (rejecting claim that Texas sex offender provisions constituted "outlawry" in violation of the Texas Constitution); *In re M.A.H.*, 20 S.W.3d 860 (Tex. Ct. App. 2000) (rejecting due process and equal protection challenges to Texas Sex Offender Registration Program).[3]

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[3] Relying on *Doe* v. *Department of Public Safety*, 271 F.3d 38 (2d Cir. 2001), petition for cert. pending, No. 01-1231 (filed Feb. 19,

The court of appeals correctly enforced petitioner's waiver of his right to appeal his sentence in this case. Petitioner entered into a counseled plea agreement in which he knowingly and voluntarily waived his right to appeal his sentence other than an upward departure from the sentencing guidelines not requested by the United States. Petitioner does not contend that he was coerced or misled into signing the plea agreement or that he was misinformed in any way about its provisions. Nor does he claim that his counsel was ineffective or that there was misconduct on the part of the prosecutor. "In no circumstance * * * may a

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2002), petitioner nonetheless argues (Pet. 7 & n.20) that Texas's sex offender registration program violates the due process and equal protection guarantees of the Fourteenth Amendment because it fails to distinguish between non-dangerous and dangerous offenders. Petitioner's reliance on *Department of Public Safety* is misplaced. There, the court held that there is a constitutionally protected liberty interest in non-disclosure of information obtained through a sex offender registration program, and that making information of this type concerning an offender publicly available constitutes a denial of due process unless the State first provides an opportunity for a particularized assessment of the offender's likely dangerousness. Unlike Connecticut's sex offender registration program, which was at issue in *Department of Public Safety*, Texas's sex offender registration program provides for an individualized assessment of an offender's dangerousness to the community, the registry identifies the sex offender's risk level, and the treatment of the registered offender depends on the individualized assessment of the level of risk he poses to the community. See Tex. Code Crim. P. Ann. arts. 62.03, 62.035, 62.045 (West 2002). For similar reasons, petitioner is not helped by *Otte* v. *Doe*, cert. granted, 122 S. Ct. 1062 (2002) (No. 01-729). That case involves an Ex Post Facto Law challenge to Alaska's sex offender registration program. Petitioner alleges no ex post facto violation here, and the Texas program's individualized assessment of dangerousness distinguishes it from Alaska's program.

defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." *Salcido-Contreras*, 990 F.2d at 53.

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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MARCH 2002